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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1968

No. 529

EARL M. OWENS,

Petitioner,

vs.

JOHN P. TRAYNOR, Deputy Commissioner,
United States Department of Labor

and

BETHLEHEM STEEL CORPORATION

Respondents.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Earl M. Owens, Petitioner, prays that this Supplemental Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be accepted and made part of the original Petition for a Writ of Certiorari previously filed in this case.

ARGUMENT

Your Petitioner wishes to advise this Honorable Court that on November 19, 1968 a Petition for Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals was filed in this Honorable Court, Case No. 757, Freddie Joe Welch and Paul L. Tugwell, vs. Gerald B. Leavy, Deputy Commissioner, et al, Respondents.

That the above Petition has requested that this Honorable Court determine the same and identical questions which have been raised by your Petitioner, Earl M. Owens.

That the original Petition filed on behalf of Earl M. Owens, presented to this Honorable Court the need for a final determination of the questions present in the case due to the questions being critical and of immediate importance in the Administration of the Longshoremen's and Harborworkers' Act throughout the country by Deputy Commissioners and the Department of Labor, that it is extremely important that the Act be uniformally interpreted and that it is in the public's interest for the Court to settle once and for all the said questions involved. The immediate need for the question presented to be answered is confirmed and substantiated by the recent filing of the Petition Number 757.

REPLY TO BRIEFS IN OPPOSITION

That in reply to the Memorandums filed on behalf of the Respondents concerning the economical loss involved in determining wage earning capacity your Petitioner presents the following legislative history amending the Longshoremen's and Harborworkers' Compensation Act:

75TH CONGRESS SENATE REPORT
3d Session No. 1988

AMENDING THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

June 6, 1938.—Ordered to be printed

Mr. BURKE, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 5690]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5690) to amend the Longshoremen's and Harbor Workers' Compensation Act, after consideration and amendment of the same, report the bill to the Senate with the recommendation that, as amended, it do pass.

The Senate amendment clarifies provisions for employer's subrogation on claims.

The House report being clearly explanatory of the bill is here incorporated and made a part hereof.

House Report No. 1945, Seventy-fifth Congress,

Third Session

The Committee on the Judiciary, to whom was referred the bill (H. R. 5690) to amend the Longshoremen's and Harbor Workers' Compensation Act, after consideration, report the same favorably to the House with amendments with the recommendation that as so amended the bill do pass.

The committee amendments are as follows:

Page 1, line 9, after the word "parentis" insert "for".

Page 5, line 8, after the word "impairment" insert a comma and the words "his usual employment" and another comma.

Page 11, line 7, after the word "to" insert "such fine or".

GENERAL STATEMENT

This bill amends certain sections of the Longshoremen's and Harbor Workers' Compensation Act in the manner hereinafter explained. All sections of that act which are not amended by this bill remain in full force and effect as they now exist, including all limitations upon the amount of compensation payable under the existing terms of the act.

The bill was introduced at the request of the United States Employees' Compensation Commission, which body has responsibility for the administration of the act. It embodies amendments which the Commission, as a result of its experience, has found desirable. A communication from the Chairman of the Commission to the Speaker of the House, requesting the introduction and consideration of the proposed legislation by Congress, follows:

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Washington, February 24, 1937.

Hon. WILLIAM B. BANKHEAD,
Speaker, House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: The United States Employees' Compensation Commission, in its annual reports since the Longshoremen's and Harbor Workers' Compensation Act became effective on July 1, 1927, has from time to time recommended certain amendments therein which its experi-

ence in the administration of the act has suggested as advisable. By the act of May 26, 1934, Public, No. 257, passed at the recommendation of representatives of interested employers and employees, some of the situations to which the Commission had called attention as needing amendment were dealt with. Subsequent experience has indicated that on some points covered by the act of May 26, 1934, further amendment is desirable. These, together with recommendations on other points which the Commission heretofore made, and a few others, have been embodied in a draft of a bill in order to place the matter before the Congress in form for its consideration and action. The said draft is herewith enclosed, with the request that it be introduced in the House of Representatives and so put in line for consideration, with a view to its enactment. Where the amendment of any provision consists of the introduction of new words therein, the words so added are indicated by underscoring in the draft; and where the amendment consists of the omission of words now in the law, the words so omitted are shown in canceled type.

In connection with the draft of the bill, there is also enclosed herewith a memorandum commenting upon the bill, section by section, and giving a brief explanation of the several amendments embodied in it and the reasons therefor.

A copy of the draft above referred to, together with a copy of the accompanying memorandum, is being transmitted at the same time, and with a like request, to the chairman of the Senate Committee on the Judiciary.

In May 1935 a similar draft was submitted by the Commission to the chairmen of the Committees on the Judiciary of the Senate and House of Representatives, respectively, and was as requested by the Commission introduced in the Seventy-fourth Congress, being S. 2791 and H. R. 8293,

respectively. Hearings were had by each committee and the bill was favorably reported in both houses, but was not enacted during the Seventy-fourth Congress. The draft herewith submitted is substantially identical with the bills above referred to, with the exception that in section 5 the proposed new subdivision (h) of section 8 has been redrafted, and sections 9, 11, and 13 contain new amendments which have been added. Section 9 proposes to amend subdivisions (g) of section 19; section 11 proposes a new subdivision (f) of section 30; and section 13 proposes to amend section 38, adding additional penal provisions. The reasons for these additional amendments are set forth in the accompanying memorandum.

As the provisions of the Longshoremen's Act affect private interests, namely, the right and obligations of employers and employees in maritime employment in respect to compensation for disability resulting through injury occurring on the navigable waters of the United States, as well as of certain employers and employees in the District of Columbia, to whom the provisions of the Longshoremen's Act were made applicable by the act of May 17, 1928, it is suggested that hearings upon the measure be had in due course, at which interested parties may have opportunity to express their views for or against the proposed amendments. In that connection, the Commission will be glad to furnish, so far as it may be able, any additional information which may be desired by the committee.

This letter, with the accompanying papers, has been submitted to the Director of the Bureau of the Budget and he advised the Commission that the recommendation herein is in accord with the policy program of the President.

Very truly yours,

(Mrs.) JEWELL W. SWOFFORD,

Chairman.

SECTION 5

The proposed amendment adding subdivision (h) to section 8 is to clarify the interpretation to be placed upon the words "wage-earning capacity" used in the act in connection with partial-disability cases. The absence of clarity in the Longshoremen's Act in this respect has been productive of wasteful litigation which has not resulted in settling the complex question of the proper factors to be considered in connection with the determination of an employee's wage-earning capacity after injury. A provision to accomplish the same general purpose was added to the New York workmen's compensation law in 1930, which will be found as subdivision 5-a of section 15 of the New York act. The proposed amendment is constructed partly after the New York provision, with an addition thereto incorporating, for clearness and for assistance to the deputy commissioners and others, a general reference to the factors to be considered in determining an employee's wage-earning capacity.

It also provides for consideration of the effects of an injury, causing permanent partial disability, upon the employees's future ability to earn. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and with his opportunity to secure gainful employment definitely limited. For instance, an employee may have an industrial hernia, retainable by a truss but not operable; but his old employer might be willing to continue him on in employment at the rate of pay at time of injury notwithstanding his impaired condition, particularly where the job does not require able-bodied labor. *It is clear that*

in such case the employee's ability to compete in the labor market has been definitely affected; and, though at present the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the Longshoremen's Act, considering not only the present effect of the disability on the employee's wage-earning capacity but also the future consequences of such disability on the employee's capacity to earn as it naturally extends into the future. The Longshoremen's Act should provide that the Deputy Commissioner may consider all of the factors which the more recent trend of decisions indicates are the logical and proper factors in the determination of wage-earning capacity.

In a case such as that referred to above where the employee returns to employment without apparent wage loss, notwithstanding impairment of physical condition and probable impairment of future wage-earning capacity, an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the limitations in the act with respect to the filing of claim for compensation and right of review of the case (sec. 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the beneficent provisions of the Longshoremen's Act. Court decisions recognizing factors other than actual wages paid after injury are *Dragons case* (161 N.E. 816, Mass.); *Roller v. Warren* (129 Atl. 158, Vt.); *Postal Telegraph Cable Company v. Industrial Accident Commission of California* (3 Pac. (2d) 6); *Hartford Accident & Indemnity Company v. Hoage* (85 Fed. (2d) 420).

The suggested addition of subdivision (i) to section 8 is designed to afford the interested parties the opportunity

of amicably disposing of cases upon agreed settlements approved by the deputy commissioner, after approval by the Commission, where awards have been made under section 8 (c) (21) and section 8 (e). Experience shows that in many cases involving disabilities under these provisions (by which compensation is based on loss of earning capacity and is subject to readjustment from time to time over long periods) agreed settlements as approved by the deputy commissioner, with approval of the Commission, would be desirable and in the interest of all parties concerned. Such settlements would be advantageous in cases involving considerable elements of doubt and, particularly where neurosis is involved, notably in cases involving back strains, traumatic neurosis, and similar disabilities in which the symptoms are for the most part subjective.

Experience, however, warns against lump-sum payments merely as a convenience in disposing of such cases. Large payments of compensation are in most cases soon dissipated, or improvidently or foolishly invested, leaving the employee an early dependent upon charity. In the proposed section the benefit of finality in the adjustment of the claim is obtained, with both employer and employee knowing of and agreeing upon the total compensation to be paid, and at the same time the provision for payments in periodic installments will afford maximum benefit and protection to the employee. Being also subject to commutation under section 14(j), as in case of other fixed awards, the provision is flexible enough to enable the deputy commissioner, with the Commission's approval, to provide for payment in sums sufficient to satisfy the needs of any particular situation that may arise.

† *See also House Report 75th Congress—3rd Session, Report No. 1945, which is the same Report Published.*

Prior to the amendment in 1938, cases of general disability (not involving injuries to specific areas of the person's body such as the loss of an arm, hand, eye, etc., which is covered by 33 U.S.C. 908(c) 1 through 20) were compensated under 33 U.S.C. 908(c) (21) set forth in original appendix, page 18, section 21 providing for compensation for other cases of permanent partial disability to be 66 and 2/3 per cent between his average weekly wages prior to injury, that is, wage earning capacity thereafter in the same or other employment. See 33 U.S.C. 902(10) set forth in original Appendix, page 18, defining disability. Wages are defined as the money rate which the service rendered is recompensed under the contract of hiring in force at the time of the injury, etc. See 33 U.S.C. 902(13) set forth in the original Appendix, page 18. These were the definitions as the Act was enacted in 1927. As can be seen, there was no statutory provision for the Deputy Commissioner to allow compensation when the employee was partially permanently disabled under 33 U.S.C. 908(c) (21), for such an injury as sustained by Petitioner, when his earnings in his disabled condition were as high or higher than they were prior to injury. As a result of this, at the request of the Department of Labor, which is charged with the administration of the Act, Congress enacted in 1938 by amendment 33 U.S.C. 908(h) set forth in original Appendix, page 18-19 (see Legislative History set forth above), which required the Deputy Commissioner to use the employee's actual earnings in passing on claims such as those of Petitioner, if such earnings fairly and reasonably represent his wage earning capacity. This manifested an intent on the part of Congress that where the employee was permanently and partially disabled other than by specific injuries (for which compensation for permanent partial disability was provided to be paid without regard to loss of earning capacity—it being effectively presumed),

that unless his earnings, fairly and reasonably represented his wage earning capacity, then the Deputy Commissioner was required to award the employee compensation; this requires the Deputy Commissioner to make a determination as to whether or not the wages received fairly and reasonably represented his wage earning capacity. Section (h) was added by amendment to prevent the many appeals that were going into Court because of the Deputy Commissioner's attempt to do this under 33 U.S.C. 908(c)(21). See Legislative History set forth above. The Deputy Commissioner in the case denied compensation because the post injury earnings of the Petitioner was higher than pre-injury earnings. This begs the issue of whether the Petitioner earnings fairly and reasonably represented their respective wage earning capacities. His wage earning capacity of necessity must be related to his respective physical ability to work, and any impairment of such physical ability, of necessity, affects his ability to earn wages.

CONCLUSION

It is respectively submitted that for the reasons previously stated and the foregoing reasons this petition for a Writ of Certiorari should be granted.

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